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No. 98-2055

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,

Petitioners,

—v.—

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

GARY D. STUMPP
Counsel of Record
ADAM M. BOND
STUMPP & BOND, LLP
45 Broadway, Suite 2106
New York, New York 10006
(212) 968-8600

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I. The Decision Below Improperly Creates EAJA Immunity

Although the Solicitor General proffers three meritless bases to deny certiorari, it studiously avoids the most compelling reason for granting review: the decision below creates EAJA immunity for the government whenever it can find *one case* to support its position, notwithstanding that its purported rationale is wholly defective, "quite unnatural," or in conflict with decisions of other courts. Such a determination not only contradicts the Court's prior holding in *Pierce v. Underwood*, 487 U.S. 552 (1988) ("*Pierce*") and ignores the Court's unanimous decision in the underlying matter, it also improperly constricts the EAJA, and places potential litigants

in the precise position the EAJA was specifically enacted to avoid (i.e., challenging unjustified government action at their own cost).

Additionally, after the Court's unanimous decision that the CFTC's jurisdictional claims were completely unfounded, the CFTC, the district court, the court of appeals, and the Solicitor General, each have sought to denigrate the rationale of this Court—the only one to address the lack of merits to the CFTC's claims—in an attempt to improperly re-write the EAJA. Indeed, unless the Court grants certiorari, not only will EAJA immunity be conferred where there is a single case in the government's favor, but "substantially justified" will have been improperly redefined.

The Solicitor General attempts to render meaningless this Court's unanimous decision (which should have bound the lower courts reviewing Petitioners' EAJA application) that the CFTC's jurisdictional arguments were not only "quite unnatural," but also "wholly unpersuasive," "unsupported by statutory language," and "in clear contravention of Congress' intent"—and the contrary conclusion (espoused by Petitioners from the outset) was "plain" from the clear statutory language. (App. 18a-19a, 22a) Instead, the decisions below improperly violate both the purpose and the statutory language of the EAJA, by actually deterring challenges to such unwarranted governmental action.

II. The Decision Below Was An Abuse of Discretion

The Solicitor General contends that in filing the underlying action, the CFTC relied on: (1) two sections of the CEA providing for options jurisdiction (7 U.S.C. §§ 2(i) and 6c(b))—although it failed to consider the Treasury Amendment's express exclusion of jurisdiction over the off-exchange foreign currency options involved here (7 U.S.C. § 2(ii)); and (2) the Second Circuit's decision in *Commodity Futures Trading Comm'n v. American Board of Trade*, 803 F.2d 1242 (2d Cir. 1986) ("*American Board of Trade*") (which it stated had held that an option on foreign currency "did not become a 'trans-

action[ ] in' that currency, within the meaning of the [Treasury] Amendment, unless and until the option was exercised")—a rationale which the Court unanimously held to be "quite unnatural." (Opp. Br. at 2-3)[1] Thus, it offers three erroneous bases to deny certiorari, namely that the decision below allegedly: (1) did not conflict with this Court's holding in *Pierce*; (2) did not ignore this Court's decision on the merits of the underlying case; and (3) did not conflict with the decision of the Seventh Circuit in *Marcus v. Shalala*, 17 F.3d 1033 (7th Cir. 1994) ("*Marcus*"). (*Id.* at 7-10) The CFTC is simply wrong.

As described herein, since the Court already has held that the CFTC had no jurisdiction over Petitioners (due to the "plain meaning" of the Treasury Amendment), the decisions below abused their discretion in concluding—without even mentioning the Court's unanimous (and rather critical) rejection of all of the CFTC's contentions—that it had met its burden to prove that its position was "substantially justified."

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[1] It also states that it cited *Board of Trade of the City of Chicago v. SEC*, 677 F.2d 1137, 1154 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982) (involving options on Government National Mortgage Association securities), and *Commodity Futures Trading Comm'n v. Sterling Capital Co.*, [1980-82 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,169, at 24,784 (N.D. Ga. Feb. 20, 1981), *modified on other grounds*, [1980-82 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,170 (N.D. Ga. Apr. 13, 1981) (involving foreign currency options)—both of which stated that the underlying option did not become a "transaction in" that commodity until it was exercised. (Opp. Br. at 3) However, *Board of Trade* held only that organized *exchange* trading in GNMA options was within CFTC rather than SEC jurisdiction; it expressly drew "no conclusion as to whether the Treasury Amendment affects any CFTC jurisdiction over options on foreign currency." (677 F.2d at 1154, n.34) Additionally, the "not until exercised" rationale utilized in both cases was unanimously held by the Court in its underlying decision to be "quite unnatural."

A. It Directly Conflicts With *Pierce*

In erroneously contending that the decision below does not conflict with *Pierce*, the CFTC correctly acknowledges that the Court there defined EAJA's "substantially justified" standard as having a "reasonable basis both in law and fact," and that appellate review of an EAJA determination is under an "abuse of discretion" standard. (Opp. Br. at 6) However, the CFTC improperly attempts to denigrate the Court's additional statement that "the fact that one other court agreed or disagreed with the Government does not establish whether its position was substantially justified," and erroneously contends that Petitioners have "ignore[d] both the context in which the Court made it and the circumstances of the present case." (Opp. Br. at 6-7) However, it is the Solicitor General which "ignores" both the relevant context and circumstances, and essentially seeks to create EAJA immunity when the government can find one case in its favor.[2]

Indeed, the Solicitor General cannot avoid the fact that the Second Circuit ignored this Court's articulated rationale in *Pierce*, and parochially relied *solely* on its own prior decision in *American Board of Trade*—even though (and without even acknowledging that) its specific rationale was held by the Court to have been "quite unnatural." (App. 18a) Moreover, the CFTC does not even attempt to respond to Petitioners' observation that the decision below renders *Pierce*'s admonition meaningless, and gives the government no incentive to carefully consider its litigating position (*see* Pet. at 7):

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[2] The CFTC also improperly seeks to limit *Pierce* by contending that it "only" held that on the record in that case, it could not be concluded "that the District Court abused its discretion in finding no 'substantial justification' for the government's position." (Opp. Br. at 7) However, in erroneously holding that the district court did not abuse its discretion in finding that the CFTC met its burden, the court below itself abused its discretion by solely relying on one case (App. 3a-4a), and by ignoring the fact that the Court had unanimously rejected that decision's rationale as "quite unnatural."

> [T]he court's holding permits the government to convert a position which was not substantially justified (although the government still won), into a position which is deemed to be substantially justified in later cases. In other words, notwithstanding the Court's acknowledgment in *Pierce* that "the Government could take a position that is not substantially justified, yet win" (487 U.S. at 569), that same position would necessarily be characterized as substantially justified under EAJA as to any later litigant.

Furthermore, the Solicitor General attempts to rely on the erroneous conclusion below "that the CFTC's jurisdictional position was substantially justified" (Opp. Br. at 7). However, it inaccurately claims that the decision below relied "primarily" (*id.*) or "principally" (*id.* at 6)—rather than *solely*—on the Second Circuit's decision in *American Board of Trade*, despite the court's specific description of that defendant as "an organization that provided, *inter alia*, an exchange or marketplace for certain commodity options transactions" (803 F.2d at 1244), thereby rendering the Treasury Amendment exemption inapplicable (as it is qualified "unless such transactions involve the sale thereof for future delivery conducted on a board of trade"). Thus, rather than constituting "a reasoned decision by a unanimous panel" (Opp. Br. at 7),[3] the analysis in *American Board of Trade* was obviously flawed. Such a fact should have been evident to the CFTC (had it performed any such analysis prior to bringing the

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[3] Moreover, the Solicitor General suggests an improper differentiation among the circuits, based on the purported expertise of the court involved. Thus, by claiming that the CFTC's alleged reliance was "substantially justified" because the Second Circuit was "a court with considerable expertise in matters relating to commercial and financial regulation" (*id.*), it improperly postulates some arbitrary ranking of circuits based on their perceived experience in the relevant subject matter. In any event, no such claims can make the decision in *American Board of Trade* any less incorrect, nor do they in any way alter the "plain language" of the Treasury Amendment.

underlying action)—particularly in light of the fact that at that time, it was already 10 years old, and its reasoning had been seriously undermined by the Fourth Circuit in *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966, 970-79 (4th Cir. 1993), *cert. denied*, 511 U.S. 1031, *reh'g denied*, 511 U.S. 1138 (1994) (which conducted an extensive analysis of the language and meaning of the Treasury Amendment, and rejected the CFTC's position). Similarly, it failed to even consider *any* of the other decisions rendered concerning the appropriate scope of the Treasury Amendment (*see* Pet. at 8, n. 4)—where only the Second Circuit in *American Board of Trade* had held (erroneously) that the CFTC had jurisdiction over *off*-exchange options.

The Solicitor General also purports to rely on the district court's erroneous determination, relying on Second Circuit dicta (58 F.3d at 52-53), that the CFTC's position allegedly had a "reasonable basis in fact," since both decisions below inaccurately stated that there was "no suggestion that the CFTC failed to investigate the facts of the case or that they did not discover wrongdoing sufficient to warrant judicial intervention." (Opp. Br. at 7, n.1; *see also id.* at 5) However, as most recently noted in Petitioners' Circuit Reply (at 9-12, footnotes omitted), the CFTC actually failed to prove any substantially justified factual basis—and instead relied solely on its allegations, many of which were demonstrably false:

> The CFTC Brief extensively describes, as if they were established facts, its naked *allegations*—even though, more than four years after they were first raised, they remain no more than that. . . . . Moreover, even though its own appointed receiver failed to sustain many of its unfounded contentions, the CFTC continues its mantra-like recitation of its purported "facts." Additionally, it contends that [the Second Circuit] "found more than sufficient factual predicate for the relief requested by the Commission"—even though [the Second Circuit] actually had only noted that "[o]n the present record" (i.e.,

> the CFTC's "evidentiary proffer," without any evidentiary hearing or actual *proof* by the CFTC), "it would *appear* that" certain improprieties may have occurred, a far different statement than that ascribed to it by the CFTC. (58 F.3d at 52-53, emphasis added).

Finally, although the Solicitor General claims that "[t]here is no force to petitioners' argument" that the CFTC had engaged in a "jurisdictional gambit," its only stated response is that the district court (erroneously) found that the CFTC "had a reasonable basis both in law and in fact." (Opp. Br. at 9, n.3) Moreover, despite this unsubstantiated claim, the record indicates that the CFTC initiated these proceedings not to remedy any alleged fraud (as to which it has completely failed to adduce any evidence), but in a continuing jurisdictional gambit. Similarly, it does not deny that this was not the CFTC's first attempt to reinterpret the Treasury Amendment and assert jurisdiction to suit its own purposes, despite the clear statutory language; that such a jurisdictional gambit also was evidenced by the CFTC's venue shopping tactics in these proceedings; and that it struggled to avoid dismissal even after the unanimous decision of this Court, by attempting to resurrect an alleged issue it previously had abandoned.[4] (*See* Pet. at 15-18)

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[4] The CFTC misleadingly describes its own activities after the Court's prior remand, by simply claiming that after such decision, "the court of appeals in turn remanded the case to the district court, with instructions to dismiss the complaint." (Opp. Br. at 4) However, as previously noted, despite the Court's unanimous decision, the CFTC's Chairperson contended that "[t]here are other issues that are still open in the case and the case will go forward" (*Futures Industry*, March 1997, at 28)—and on remand, the CFTC persisted in its unwarranted attempts to continue the underlying litigation, by purporting to resurrect previously abandoned contentions. Ultimately, the Second Circuit rejected the CFTC's improper attempt, and directed that the district court dismiss the complaint.

B. It Ignored the Underlying Decision of the Court Before Remand

In erroneously contending that the decision below did not conflict with the Court's underlying decision in this case, the Solicitor General cites the Court's observation in *Pierce* that "a position can be justified even though it is not correct" and that an EAJA determination is based on "not what the law now is, but what the Government was substantially justified in believing it to have been." (Opp. Br. at 8) However, the "law" at issue here—the Treasury Amendment to the CEA, 7 U.S.C. § 2(ii)—has *not* changed; its "plain language" is the same as when it was first enacted in 1975. Thus, in attempting to usurp jurisdiction which was clearly exempted by the provision, the CFTC was not "substantially justified in believing it to have been" any different than its "plain language." (*See also* Petitioners Reply Brief to this Court in the underlying action at 18-19, noting that since its creation in 1975, the CFTC has proffered at least three inconsistent Treasury Amendment interpretations.)

Moreover, in claiming that the decisions below "understood and applied [the cited] standards in this case" (*id.* at 9), the Solicitor General asserts that those arguments "were not unreasonable" (*id.*), and the Court merely found them "unpersuasive" (*id.*) and "rejected the statutory construction (and controlling circuit precedent) on which the Commission relied" (*id.* at (I)).[6] In this fashion, the CFTC (apparently deliberately) continues to attempt to denigrate this Court's underlying decision, as well as its stated reasoning, by effectively contending that its position was "substantially justified" even where this Court unanimously held that it was not only "quite unnatural," but also "wholly unpersuasive,"

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[6] It is significant to note that the only support proffered for such a contention were various examples purporting to demonstrate "the important public purposes that the Commission sought to further by pursuing remedies for the [allegedly] fraudulent conduct in which petitioners had engaged." (Opp. Br. at 9) Again, the CFTC's somehow substitutes its naked allegations for proof.

"unsupported by statutory language," and "in clear contravention of Congress' intent." Thus, the Solicitor General advocates some talismanic EAJA immunity due to a single prior decision, the underlying rationale of which was wholly rejected by the Court.

The decision below improperly ignored the unanimous opinion of the Court—the only court to even address the merits of Petitioners' contentions—and parochially relied solely on its own ten year old decision, the underlying rationale of which was wholly rejected by the Court. As previously noted, particularly where the "reasoning" of *American Board of Trade* clearly represented a misreading of the plain meaning of the Treasury Amendment, and the CFTC exploited it for a "free ride" through the Second Circuit—both on the merits of the underlying action, as well as on the subsequent EAJA application—Petitioners properly should not be compelled to bear the cost of its unwarranted jurisdictional gambit.

C. It Directly Conflicts With The Seventh Circuit

In erroneously contending that the decision below did not conflict with the decision of the Seventh Circuit in *Marcus*, the Solicitor General simply seeks to rely on its application of an "abuse of discretion" standard of review, and tautologically concludes that "[s]ince the district court relied on the appropriate standard and its decision has a basis in reason, we cannot conclude that it abused its discretion." (Opp. Br. at 10, citing 17 F.3d at 1038) Thus, it is apparently of no moment to the Solicitor General that *Marcus* actually affirmed an EAJA award, or that the current conflict stemming from the decision below creates substantial uncertainty concerning the scope and meaning of the EAJA.

Moreover, aside from any such conflict with the Seventh Circuit, the Solicitor General never explains how something more than a unanimous decision of the Court before remand, as well as prior EAJA precedent of the Court (and governing

authority of the Second Circuit)[7] should have been necessary below. Similarly, the Solicitor General failed to explain how the CFTC can claim to have relied on outdated Second Circuit precedent in the underlying action, but after those contentions are held to be "quite unnatural" by a unanimous Court, it then can claim that it is somehow (conveniently) *not* bound by that decision and the Second Circuit's own EAJA authority. Instead, as the Second Circuit held in *Political Contributions*, it should have reversed the denial of EAJA fees "not because the government lost its claim, but because a previous panel of this court [or here, this Court] determined that the statutory language and the legislative history were clear." (*Id.* at 387)

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

GARY D. STUMPP
Counsel of Record
ADAM M. BOND
STUMPP & BOND, LLP

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[7] As to the internal conflict between the decision below and the Second Circuit's prior opinion in *Federal Election Comm'n v. Political Contributions Data, Inc.*, 995 F.2d 383 (2d Cir. 1993), *cert. denied*, 510 U.S. 1116 (1994), the CFTC simply asserts that the decision below "properly rejected" such a claim—without proffering any rationale therefor, and further contended that "[a]ny such conflict would, in any event, be a matter for resolution by the Second Circuit, rather than by this Court." (Opp. Br. at 10, n. 4) However, it neglects to even address that the Circuit itself not only failed to resolve such conflict, but actually created the conflict by its contradictory rulings. *But see, e.g., Gold v. Feinberg*, 101 F.3d 796, 801 (2d Cir. 1996) (prior Circuit precedent is binding, and can only be overruled by in banc review or a decision of the Supreme Court).